

M e m o r a n d u m

To : Edward W. King, Chief
Fuel Taxes Division, MIC: 33

Date: September 5, 2006

From : Carolee D. Johnstone
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Subject: Aircraft Jet Fuel Tax and Taxpayer
All-Cargo Air Transportation Certificate Issued Pursuant to 49 U.S.C. § 41103

In a memorandum dated March 8, 2006, you asked that my prior memorandum regarding the above-referenced taxpayer and application of the Aircraft Jet Fuel Tax under the Motor Vehicle Fuel Tax Law be reissued to reaffirm the analysis therein. My prior memorandum, dated July 26, 2005, addressed the legal status of an all-cargo air transportation certificate. The specific question was: Does the domestic all cargo carrier certificate which was held prior to 2002 exempt it from tax on purchases of aircraft jet fuel as a common carrier?

As discussed more fully below, the all-cargo air transportation certificate, issued to an air carrier by the United States Secretary of Transportation (DOT), pursuant to Title 49 United States Code (49 U.S.C.) section 41103, is sufficient to satisfy the air carrier certificate requirement under California Revenue and Taxation Code section 7389, subdivision (a).^{1,2} The language of section 7389, subdivision (a) and historical documents relating to the bill that created the exemption³ indicate that the exemption was meant to apply to aircraft jet fuel users engaged as air common carriers of cargo, as well as of passengers.

Discussion

Based on the information provided by Fuel Industry Section staff, it appears that, prior to 2002, Freight Carrier held an "all-cargo air transportation certificate," issued by the DOT, pursuant to 49 U.S.C. section 41103. Freight Carrier did not hold a "certificate of public convenience and necessity" issued by the DOT pursuant to 49 U.S.C. section 41102.

Federal Law

The DOT issues a certificate of public convenience and necessity under 49 U.S.C. section 41102. Specifically, the DOT "may issue a certificate of public convenience and necessity to a citizen of the United States authorizing the citizen to provide . . . : (1) air transportation as an air carrier [or] . . . (3) charter air transportation as a charter air carrier." (49 U.S.C.A. § 41102(a) [emphasis added].)

¹ Formerly Revenue and Taxation Code section 7374, subdivision (a).

² All future statutory references will be to the California Revenue and Taxation Code unless indicated otherwise.

³ Assem. Bill No. 1244 (1969).

The DOT also issues a certificate authorizing a citizen of the United States to provide all-cargo air transportation under 49 U.S.C. section 41103.⁴ Specifically, the DOT “shall issue the certificate to a citizen of the United States authorizing the citizen, as an air carrier, to provide any part of the all-cargo air transportation applied for . . .” (49 U.S.C.A. § 41103(b) [emphasis added].) “All-cargo air transportation” is defined as “the transportation by aircraft in interstate air transportation of only property or only mail, or both.” (*Id.* at § 40102(a)(10) [emphasis added]; see 14 C.F.R. § 204.2(a).)

Both of these provisions are included under Chapter 411, entitled “Air Carrier Certificates,” of Title 49 of the United States Code.⁵ Also included under this chapter is a provision which precedes sections 41102 and 41103 and provides:

- (a) General. – Except as provided in this chapter or another law –
 - (1) an air carrier may provide air transportation only if the air carrier holds a certificate issued under this chapter authorizing the air transportation;
 - (2) a charter air carrier may provide charter air transportation only if the charter air carrier holds a certificate issued under this chapter authorizing the charter air transportation; and
 - (3) an air carrier may provide all-cargo air transportation only if the air carrier holds a certificate issued under this chapter authorizing the all-cargo air transportation. (49 U.S.C.A. § 41101(a) [emphasis added].)

Section 41101 makes it clear that an “air carrier” of any nature may not provide any type of “air transportation” unless the air carrier “holds a certificate issued under this chapter,” i.e., an “Air Carrier Certificate.” (49 U.S.C.A. §§ 41101(a)(1), (2) & (3).)

It is also evident that, except for some appreciation of the nature of the operation, the DOT treats both air carriers operating under the air transportation certificate and air carriers operating under the all-cargo air transportation certificate essentially the same. First, both of these certificates are issued pursuant to Chapter 411, and both of them are “air carrier certificates.”

Further, with regard to policy, the DOT is directed to consider numerous matters, in carrying out, *inter alia*, Chapter 411, “as being in the public interest and consistent with public convenience and necessity,” both for air carriers holding certificates of public convenience and necessity under 49 U.S.C. section 41102 and for air carriers holding all-cargo air transportation certificates under 49 U.S.C. section 41103. (49 U.S.C.A. § 40101(a) [emphasis added].) In other words, air carriers operating under all-cargo air transportation certificates are subject to the same

⁴ Certificates of public convenience and necessity authorize the air carrier to transport both passengers and property.

⁵ Federal statutes pertaining to aviation are governed by Subtitle VII, entitled “Aviation Programs” (§ 40101 et seq.), of Title 49, entitled “Transportation.” Chapter 401, including section 40101 discussed below, is contained in Subpart I and Chapter 411 is contained in Subpart II of Part A of Subtitle VII.

considerations of public convenience and necessity, such as “assigning and maintaining safety as the highest priority in air commerce,” as are air carriers operating under air transportation certificates.⁶ (*Id.* at § 40101(a)(1).)

In addition, the DOT treats air carriers operating under both certificates the same with respect to the regulations it has promulgated pursuant to, among others, Chapter 401 (§ 40101 et seq.) and Chapter 411 (§ 41101 et seq.). For example, with regard to formal application requirements:

Applications for certificates of public convenience and necessity under section 41102 of the Statute and for interstate all-cargo air transportation certificates under section 41103 of the Statute shall meet the requirements set forth in part 302 of this chapter[, commencing at § 302.1 et seq., entitled “Rules of Practice in Proceedings,”] as to general requirements, execution, number of copies, service, and formal specifications of papers. (14 C.F.R. § 201.1(a) (2004) [emphasis added].)

Part 302 of title 14 of the Code of Federal Regulations (14 C.F.R.) “governs the conduct of all aviation economic proceedings before the [DOT] whether instituted by order of the [DOT] or by the filing with the [DOT] of an application, complaint, . . . or other authorized or required document.” (*Id.* at § 302.1(a).) “Subpart A[, commencing at § 302.3 et seq.] . . . sets forth general rules applicable to all types of proceedings. Each of the other subparts . . . sets forth special rules applicable to the type of proceedings described in the title of the subpart.” (*Id.* at § 302.1(b).)

Subpart B, commencing with 14 C.F.R. § 302.201, is entitled “Rules Applicable to U.S. Air Carrier Certificate and Foreign Air Carrier Permit Licensing Proceedings” and is applicable to, among others: “U.S. air carrier certificates of public convenience and necessity and U.S. all-cargo air service certificates under Chapter 411 of the Statute, including renewals, amendments, modifications, suspensions and transfers of such certificates.” (*Id.* at § 302.201(a)(1) [emphasis added].) Despite differences in the language of 49 U.S.C. sections 41102 and 41103,⁷ air carrier certificate authority granted pursuant to both provisions is governed by the same regulation specifying how applications may be disposed of, i.e., either may or may not be required to participate in an oral evidentiary hearing before the DOT makes a final determination on the

⁶ The DOT is further directed, with regard to all-cargo air transportation, to consider additional matters, “in addition to the matters referred to in subsection (a) of this section, as being in the public interest for all-cargo air transportation,” such as “encouraging and developing an expedited all-cargo air transportation system provided by private enterprise and responsive to – (A) the present and future needs of shippers; (B) the commerce of the United States; and (C) the national defense.” (49 U.S.C.A. § 40101(b)(1) [emphasis added].)

⁷ Under section 41102, the DOT must find that the air carrier of people is “fit, willing, and able to provide the transportation” and to comply with the applicable statutes and regulations, and that such transportation is “consistent with the public convenience and necessity,” after notice and opportunity for response and public hearing, before a certificate of public convenience and necessity can be issued. (49 U.S.C.A. §§ 41102(b) & (c), § 41108.) There is no such requirement in section 41103.

application. (See 14 C.F.R. § 302.210 [entitled "Disposition of applications; orders establishing further procedures"].)

Finally, pursuant to the authority granted under, among others, Chapters 401 and 411, "[a]n applicant for . . . certificate authority . . . shall file the [fitness] data set forth in . . . this section." (14 C.F.R. § 204.3; see *id.* at § 302.211.) Certificate authority is defined as follows:

Certificate authority means authority to provide air transportation granted by the [DOT] or Civil Aeronautics Board in the form of a certificate of public convenience and necessity under section 41102 of the Statute or an all-cargo air transportation certificate to perform all-cargo transportation under section 41103 of the Statute. *Certificated carriers* are those that hold certificate authority. (*Id.* at § 204.2(b) [italics in original, underline added].)

In other words, it appears that, from a federal statutory and regulatory perspective, no significant difference exists between an air carrier that provides air transportation of people, under a certificate of public convenience and necessity, and an air carrier that provides air transportation of property, or cargo, only, under an all-cargo air transportation certificate. Both air carriers must provide, and the DOT must consider, the same fitness data, and the DOT must make the same policy decisions regarding public convenience and necessity before either certificate may be issued.⁸

State Law

Section 7389 provides, in pertinent part, as follows:

"Aircraft jet fuel user" means any person who uses aircraft jet fuel for the propulsion of an aircraft in this state except the following:

⁸ The Federal Aviation Administration (FAA) also treats air carriers of people and property the same with regard to safety and related operational requirements. For example, "[a] person authorized by the [FAA] to conduct operations as a direct air carrier will be issued an Air Carrier Certificate." (14 C.F.R. § 119.5(a) [emphasis added].) Further, "[a] person may not operate as a direct air carrier unless that person . . . [o]btains an Air Carrier Certificate." (*Id.* at § 119.35(a) [emphasis added].) In addition, with regard to "domestic operations": "This part [Part 121] prescribes rules governing – (a) The domestic . . . operations of each person who holds or is required to hold an Air Carrier Certificate . . . under part 119 of this chapter." (*Id.* at § 121.1 [emphasis added].) Additionally, "*Domestic operation* means any scheduled operation conducted by any person operating . . . (1) Airplanes: . . . (ii) . . . having a passenger-seat configuration of more than 9 passenger seats, excluding each crewmember seat; or (iii) . . . having a payload capacity of more than 7,500 pounds . . ." within and/or among the 48 contiguous states or the District of Columbia or within any territory or possession of the United States, and "[d]irect air carrier means a person who provides or offers to provide air transportation and who has control over the operational function performed in providing that transportation." (*Id.* at § 119.3)

- (a) A common carrier by air engaged in the business of transporting persons or property for hire or compensation under a certificate of public convenience and necessity issued pursuant to the authority of the laws of this state, of the United States or of any foreign government. (§ 7389, subd. (a) [emphasis added].)

Chapter 2.5, pertaining to Aircraft Jet Fuel Tax and including, then, section 7374, was added to the Revenue and Taxation Code in November 1969, to be effective December 1, 1969, by Assembly Bill 1244 (AB 1244). The language contained in section 7389, quoted above, has not been amended since section 7374, as section 7389 was previously known, was added in 1969.

Since at least 1872, the State of California has defined “common carrier” as follows: “Every one who offers to the public to carry persons, property, or messages . . . is a common carrier of whatever he thus offers to carry.” (Civ. Code, § 2168 [emphasis added].) “Common carrier” is also defined in the California Code of Regulations (CCR) as “any person who engages in the business of transporting persons or property for hire or compensation and who offers these services indiscriminately to the public or to some portion of the public.” (Cal. Code Regs., tit.18, §1621 [emphasis added]; *id.* at § 1593.)

The California Legislature may not have realized there was more than one type of “air carrier certificate” when it first developed and enacted the exemptions to the application of aircraft jet fuel tax to “aircraft jet fuel users” in 1969. The language of section 7389 (formerly section 7374), subdivision (a), clearly states that the exemption applies to a “common carrier” that is “transporting persons or property.” The implication of this language is that property alone, without passengers, may be transported in order for a common carrier to qualify for the exemption. However, as noted above, the certificate issued by the DOT when only property is transported is not a “certificate of public convenience and necessity,” issued pursuant to section 49 U.S.C. section 41102, but an “all-cargo air transportation” certificate, issued pursuant to 49 U.S.C. section 41103.

Historical documents⁹ relating to AB 1244 support the conclusion that the California Legislature intended that common carriers that provide air transportation of property only should be included in the exemption from imposition of the aircraft jet fuel tax. There are numerous references in these documents that indicate that the tax only applies to “aircraft not engaged [or operating or being used] as common carriers.” (State Bd. of Equalization Research and Statistics, Revenue Estimates pertaining to Assem. Bill No. 1244 (1969) (Revenue Estimates) Apr. 28, 1969, p. 1 [emphasis in original]; Revenue Estimates May 15, 1959 [sic]; Revenue Estimates June 24, 1969 (all attached hereto).)

⁹ Obtained from historical records maintained by the Legislative Counsel’s Office, Legislative Division, State Board of Equalization, Sacramento, California.

Further, the Legislative Analyst reported, as is relevant here, that:

This bill proposes to include aircraft jet [f]uel under the motor vehicle fuel license tax provisions and to tax this fuel at two cents per gallon when sold for use in propelling aircraft not engaged as a common carrier. (Leg. Analyst, Analysis of Assem. Bill No. 1244 (Schabarum), 1969 Session, Apr. 24, 1969 [emphasis added] (attached hereto).)

In addition, in his letter of recommendation to Governor Ronald Reagan in support of AB 1244, the Executive Secretary of the State Board of Equalization stated: "Common carriers, persons engaged in the business of constructing or reconstructing aircraft[,] and the armed forces of the United States are excluded from the [aircraft jet fuel] tax." (Executive Secretary H. F. Freeman, letter to Governor Ronald Reagan re Assem. Bill No. 1244 (1969) Aug. 14, 1969 [emphasis added] (attached hereto).)

In none of these discussions of AB 1244 is a distinction made between common carriers of people and common carriers of property only. Further, there is no mention of a requirement that the common carrier must be operating pursuant to a certificate of public convenience and necessity issued by the United States or any other government to qualify for the exemption. These discussions make it clear that the California exemption from the definition of "aircraft jet fuel user" is focused primarily on whether the person is a "common carrier," and, as noted above, the language of section 7389 itself states that the person may be "[a] common carrier by air engaged in the business of transporting persons or property for hire." (§ 7389, subd. (a) [emphasis added].)¹⁰

Therefore, it is our conclusion that the certificate reference in the exemption provided under subdivision (a) of section 7389 was intended by the California Legislature to be a generic reference to an "air carrier certificate" issued by the United States, not a specific reference to a certificate issued pursuant to 49 U.S.C. section 41102, as opposed to a certificate issued pursuant to 49 U.S.C. section 41103, both of which are "air carrier certificates."

Finally, during a telephone conversation which took place on May 23, 2005, between Lou Felletto, Fuel Industry Section, State Board of Equalization, and Bill Bertram, Air Carrier Fitness Division, DOT, Mr. Bertram stated, first, that the DOT considers a certificate issued to a cargo-only carrier under 49 U.S.C. section 41103 to be a certificate of public convenience and necessity. In addition, the list of certificated air carriers published by the DOT includes the carrier in question here, which can be identified as having a cargo-only designation. Thus, our interpretation of the exemption contained in section 7389, subdivision (a), and of the historical

¹⁰ It is also apparent that those "citizens of the United States" who provide "air transportation," under 49 U.S.C. section 41102, and "all-cargo air transportation," under 49 U.S.C. section 41103, and who are engaged in "interstate air transportation" are "common carriers." (See, e.g., *id.* at §§ 40102(a)(2), 40102(a)(5), 40102(a)(25).)

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documents related to the bill that created the exemption is consistent with the DOT's treatment of the certificate issued by the DOT pursuant to 49 U.S.C. section 41103.

Therefore, since the United States government treats air carriers certificated under both statutes essentially the same and an all-cargo air transportation certificate is substantially the same as a certificate of public convenience and necessity, and since the California Legislature meant to exempt "common carriers," including common carriers of property, from imposition of the aircraft jet fuel tax, for the purpose of exemption from the aircraft jet fuel tax under Chapter 2.5, an "all-cargo air transportation" certificate is sufficient to satisfy the certificate requirement under section 7389, subdivision (a).

Please call me if you have questions regarding the information provided above or would like further assistance with this matter.

Attachments:

- State Board of Equalization Research and Statistics, Tax Revenue Estimates, AB 1244, 4/28/69.
- State Board of Equalization Research and Statistics, Tax Revenue Estimates, AB 1244, 5/15/[6]9.
- State Board of Equalization Research and Statistics, Tax Revenue Estimates, AB 1244, 6/24/69.
- Memorandum from H. F. Freeman, Executive Secretary, State Board of Equalization, to Ronald Reagan, Governor of California, 8/14/69.
- Analysis of Assembly Bill No. 1244 (Schabarum), 1969 Session, 4/24/69.

cc: Lou Feletto (MIC:33)
Doug Shepherd (MIC:65)
Arlo Gilbert (MIC:33)
Todd Keefe (MIC:56)
Randy Ferris (MIC:82)

REVISED ESTIMATE

G. C REV. 1 (1-69)
TAX VENUE ESTIMATES

STATE BOARD OF EQUALIZATION
RESEARCH AND STATISTICS

Bill number AB 1244 Date introduced 3/26/69
 Author Schabarum Tax Motor Vehicle Fuel Tax
 Related bills _____

PURPOSE:

To place a tax of two cents per gallon on aircraft jet fuel when sold for use in propelling aircraft not engaged as common carriers

Effective date Assumed October 1, 1969

REVENUE EFFECT:

First full year

Net revenue effect to State-----	+\$ 85,000
Motor vehicle fuel tax-----	+ 235,000
State sales tax (decrease)-----	- 150,000
Local sales tax (decrease)-----	- 38,000
Increased tax burden on industry-----	- 47,000

BASIS OF ESTIMATE:

Due to a change in data received by the Department of Finance from industry sources and the Petroleum Research Division, Bureau of Mines, Department of the Interior, this estimate has been revised.

During 1968 about 49,476,000 gallons of jet fuel were sold nationally for propelling aircraft not operating as common carriers. At a 20 percent rate of growth, this figure will reach about 78,368,000 gallons for fiscal year 1970-71. Assuming California has 15 percent of the business, there will be approximately 11,755,000 gallons sold in the State during 1970-71. Taxed at two cents per gallon this would produce approximately \$235,000 in revenue.

By placing the tax of jet fuel for aircraft not being used as common carriers under the provisions of the Motor Vehicle Fuel License Tax, the sale of jet fuel for this purpose would cease to be subject to the sales tax. Sales of 11,755,000 gallons of jet fuel estimated at 32 cents per gallon amount to \$3,762,000 which taxed at the combined state and local

PERTINENT WORKLOAD DATA:

--continued

Estimates made by George Billingsley Date 4/28/69

rate of five percent is producing approximately \$188,000 in revenue a year.

The net effect of the bill for the first full year would be an increase in taxes of \$47,000 (\$235,000 - \$188,000). Broken down, the first full year effect would be as follows:

Decreases in sales taxes:

State General Fund revenue-----	-\$150,000
Local sales tax-----	-38,000
Increase in Motor Vehicle Fuel Tax----- -235,000	

If the bill is amended so as to prevent the loss of the sales tax revenue, then there would be an overall increase of approximately \$235,000 in Motor Vehicle Fuel taxes during the first full year.

John B. Wright